SOUTHERN UTAH WILDERNESS ALLIANCE * THE WILDERNESS SOCIETY
NATURAL RESOURCES DEFENSE COUNCIL * SIERRA CLUB
NATIONAL PARKS CONSERVATION ASSOCIATION
CAMPAIGN FOR AMERICA'S WILDERNESS

January 12, 2004

Gale Norton, Secretary
United States Department of the Interior
1839 C Street N.W.
Washington, D.C.

Via Fax No. (202) 208-6677 and U.S. Mail

Re: Department of Interior's Review of R.S. 2477 Highway Claims under the April 2003 Memorandum of Agreement with State of Utah

Dear Secretary Norton:

As you know, the State of Utah will soon submit to the Bureau of Land Management what will likely be only the first of thousands of R.S. 2477 highway claims under the April 9, 2003 Memorandum of Understanding between the State of Utah and the Department of Interior. Based on our field visits to countless R.S. 2477 claims, our review of recent maps of county R.S. 2477 claims, and statements by state and county officials, we know that many of these claims do not meet the most basic requirements of R.S. 2477. Indeed, many are simply barely visible dirt tracks or dry stream beds. Identifying these tracks as county "highways" however, would make nearly impossible the management of these public lands in a way that fairly balances development and preservation.

We support a fair, inclusive and environmentally sensitive attempt to resolve the R.S. 2477 issue – and indeed, have long sought to put this issue to rest so that responsible land use planning and protective management strategies, including wilderness designation and preservation, can move forward.

We stress, **however,** that the standards provided in the law itself must serve as the foundation for the BLM's review of any claims made under the statute. **Importantly, while the MOU -- itself grounded in the illegal 'Disclaimer Rule--'[1] can create additional requirements for RS 2477 claims, it cannot ignore them.** To the extent that the Department uses the MOU to undercut existing law, it will needlessly perpetuate

[1] 68 Fed. Reg. 494 (Jan. 6, 2003). We note that the Department received nearly 20,000 public comments opposed to the disclaimer rule, and only a few in support of the rule. In response, the Department issued the already flawed rule with revisions that actually expanded the class of potential RS 2477 claimants and heightened the risk of abusive highway claims.

controversy and litigation, stall the resolution of the issue, and delay effective management and protection of public lands increasingly vulnerable to development.

Thus, we expect the Department's review of all R.S. 2477 claims to hew strictly to the letter of the law as embodied in the terms of the statute itself, in the Department's own historic interpretation of the law; and in accordance with the federal court's decision in Southern Utah Wilderness Alliance v. Bureau of Land Management., 147 F.Supp.2d 1130 (D. Utah 2001). That decision, which the Interior Department continues to defend in Federal court, and which three Utah counties have as of yet fruitlessly contested, reaffirmed RS 2477's clear, basic requirements of actual construction of a legitimate highway that leads to an identifiable destination.

However, the MOU (and Interior Department guidance that followed it in June 2003), unlawfully ignores these elements, and focuses instead largely on whether a route is "used" - an approach specifically rejected by the courts:

> Congress in 1866 desired that R.S. 2477 rights of way be intentionally, physically worked on to produce a surface conducive to public traffic.

Southern Utah Wilderness Alliance v. BLM, 147 F.Supp.2d at 1139. Citing, among other things, the long-standing Interior Department interpretation of R.S. 2477, the **court specifically upheld BLM's conclusion that "use" "sets a lower standard for the establishment of rights-of-way over federal lands than the one intended by Congress."** Id. at 1142, n. 4.

The court also held that the claimed right-of-way had to be a "highway" that **"connects the public with identifiable destinations or places**." Id. at 1143-44.

SUWA, the Sierra Club, and other members of the public participated in the BLM's administrative review of the 16 claims at issue in the case described above. That process included, among other things, BLM field trips to the claims (open to the public), the publication of notices in various Utah newspapers and other outlets inviting the public to provide information relevant to the claims, and several requests to the three counties involved to submit all information in support of their claims. (The BLM even extended the public comment deadline on its own accord after the counties failed to provide information in support of their claims.) BLM's prior process also involved a review of agency records, as well as those submitted by third parties, and squarely and properly placed the burden of establishing the existence of a right-of-way upon the claimant.

Unlike the process underway now, in which the public cannot even obtain a list of R.S. 2477 "highways" from the State or counties, the BLM's pre-MOU approach was inclusive, open, and based on the law**, and it did not result in the closure of a single legitimate public "highway."**

> Excessive R.S. 2477 Highway Claims with Corresponding Environmental Harm Support the Need for Careful Review by Public and by the Interior Department

The public has reason to be concerned that the State and/or Utah counties will continue to pursue bogus 'highway" claims as a pretext for wilderness disqualification or as a means to interfere with other land management strategies and mandates which strive to preserve, rather than mar, increasingly rare and scenic wilderness landscapes. For example:

1. The State of Utah and certain Utah counties have relied on a tortured interpretation of R.S. 2477 to claim that stream beds, faint trails, and eroded tracks created by all-terrain vehicles are "highways" beyond the jurisdiction of federal land managers and federal laws meant to preserve America's public lands for the benefit of all.

2. The secrecy with which counties, the State and the Department have pursued the identification and evaluation of R.S. 2477 claims, coupled with the Department's refusal to specify the standards by which it will evaluate the claims and its failure to respond to open records act requests on the issue, all raise red flags about the legitimacy of many of the claims and the process itself. We are particularly frustrated by the State-imposed gag order, which prevents county officials from talking with us or anyone about the location and bases for their claims. This has led – ridiculously – to some county commissioners demanding that the BLM respect their R.S. 2477 claims in ongoing land planning efforts, while being barred from disclosing the location or bases for those claims.

3. Salt Lake County officials were surprised that a number of R.S. 2477 claims were on state maps that the County did not want, did not ask for, and did not know about until a local citizens group obtained R.S. 2477 maps through a freedom of information act request and subsequent litigation. Because these "highways" were in such environmentally sensitive areas -- and were actually hiking trails in many cases -- Salt Lake County publicly disowned the claims, to the great embarrassment of the State R.S. 2477 proponents. See www.sltrib.com/2004/Jan/01072004/utah/126779.asp.

We have repeatedly attempted to talk with various county commissioners in Utah in a proactive attempt to share our information on R.S. 2477 claims, and reach a mutual understanding regarding the validity of county R.S. 2477 highway claims. For example, in 1999, SUWA, the Sierra Club, BLM and Kane County reached an agreement on the extent and location of the County's R.S. 2477 claims within the Grand Staircase – Escalante National Monument in the context of the SUWA v. BLM case cited above. Ultimately, the County Commissioners bowed to intense pressure from anti-wilderness interests and did not finalize the agreement. (Unfortunately for Kane County, it went on to lose the case in the District Court, and taxpayers are still subsidizing the litigation.)

Conclusion

We have always advocated a reasonable and balanced approach to public lands and the preservation of their most scenic wilderness areas, and we will continue to work

hard to ensure that all lands embraced within America's Redrock Wilderness Act – from the redrock canyons of the east to the sweeping Basin and Range country of the west – are protected from damaging, illegitimate highway claims under R.S. 2477.

This issue is not about closing roads or blocking access to public lands. Nearly 100,000 miles of dirt roads and more primitive tracks are available for motorized use outside of the Redrock Wilderness lands. In addition, the BLM has granted literally thousands of rights-of-way to various entities across the public domain under Title V of the Federal Land Policy and Management Act of 1976. That provision authorizes the BLM to grant rights-of-way across public lands while also ensuring that increasingly rare and important public treasures like wilderness, wildlife habitat, archeological sites, fossils and healthy riparian areas are not harmed. Unlike R.S. 2477, it is a modern approach which respects the public interest in preserving the environment and in providing balanced, reasonable access.

Toward that end, we will continue to examine closely all R.S. 2477 claims to ensure that important wilderness landscapes, wildlife habitat, pristine streams, solitude and quiet, and other sensitive environmental values – icons of the American wilderness -- are not needlessly sacrificed.

Sincerely,

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